SUPREME COURT, U.S.
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No. 94-1666

In the Supreme Court of the United States

OCTOBER TERM, 1994

LYNDON B. FREDERICK, PETITIONER

v.

GOVERNMENT OF THE VIRGIN ISLANDS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

DREW S. DAYS, III
Solicitor General

JO ANN HARRIS
Assistant Attorney General

DEBORAH WATSON
Attorney

Department of Justice
Washington, D.C. 20530
(202) 514-2217

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QUESTIONS PRESENTED

1. Whether the district court was required to suppress a loaded firearm that the police found in petitioner's bedroom closet after petitioner called the police to his home to report a shooting.

2. Whether the prosecutor made improper use of illegally obtained evidence during his cross-examination of petitioner.

3. Whether the district court correctly instructed the jury on excusable homicide under Virgin Islands law.

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OPINION BELOW

The order of the court of appeals (Pet. App. 3a-5a) is unpublished, but the judgment is noted at 46 F.3d 1116 (Table).

JURISDICTION

The judgment of the court of appeals was entered on December 16, 1994. A petition for rehearing was denied on January 13, 1995. Pet. App. 1a-2a. The petition for a writ of certiorari was filed on April 11, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of the Virgin Islands, peti-

tioner was convicted of second degree murder, in violation of V.I. Code Ann. tit. XIV, §§ 921, 922(b) (1964) (Count 1); unlawful possession of a machine gun (a Glock semi-automatic pistol), in violation of V.I. Code Ann. tit. XIV, §§ 2253(b) and (d) (Supp. 1994) (Count 2); and obstruction of justice, in violation of V.I. Code Ann. tit. XIV, § 1508 (1964) (Count 5). He was sentenced to 40 years' imprisonment. The court of appeals affirmed. Pet. App. 3a-5a.

1. In the morning of August 13, 1992, petitioner telephoned the police to report a shooting at his home in St. Croix, Virgin Islands. 11/5/93 Tr. 5.[1] When Officers Benjamin Rios and Darius George arrived at the scene, petitioner met them outside the house and told them that he had shot his girlfriend. 1 Tr. 27-29. Petitioner then led the officers inside the house and pointed them to the bedroom. *Id.* at 29, 53. As the officers walked through the main part of the house to petitioner's apartment, Officer George saw a Smith & Wesson nine-millimeter handgun and a magazine clip on a table just outside petitioner's bedroom. 12/20/93 Tr. 29, 32, 44, 47.

When the officers entered the bedroom, they saw petitioner's mother, sitting on the bed and cradling the head of petitioner's girlfriend, Kemba Hendricks, who had been shot beneath the left eye. 1 Tr. 29-30,

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[1] The suppression hearing was conducted on November 5, November 8, and December 20, 1993. Trial was conducted from December 22 to December 27, 1993. Numerical references to volumes of the transcript refer to the transcript of the trial. "3A Tr." and "3B Tr." refer to the transcripts of the December 22, 1993, morning and afternoon trial proceedings, respectively.

33-34, 56. Petitioner told the officers that a gun had accidentally discharged when he leaned over to kiss Hendricks. Officer Rios asked petitioner what weapon had discharged. Petitioner replied, "with this," grabbed the Smith & Wesson handgun from the table and attempted to throw the gun out the door. Officer Rios seized the weapon, and Officer George seized the loaded magazine clip from the table. Petitioner was taken outside the house and handcuffed. 1 Tr. 30-31, 36-37, 43-44, 46, 48, 56-57, 59.

As petitioner was being handcuffed, other officers arrived and entered the bedroom. 1 Tr. 58-59; 2 Tr. 5-6. Forensic Investigator Jonathan Hitesman found a spent shell casing from a nine-millimeter weapon underneath the bed. 11/8/93 Tr. 2, 4. After looking at the shell casing, Hitesman concluded that it had been fired from a Glock firearm, and not from petitioner's Smith & Wesson handgun. Hitesman observed that the shell casing had a "dug-in groove" peculiar to Glock weapons, and not the "smooth round impression" made by other weapons. *Id.* at 4-6, 13-14, 17.

Officer James Rhymer observed a rifle butt resting on the shelf of an open closet, about four to five feet from the bed. The rifle butt was flush with the edge of the shelf, which was approximately six to seven feet high. When Rhymer stood on a chair to inspect the rifle, he saw something underneath a box on the shelf on the other side of the closet. 11/5/93 Tr. 61-63, 70, 72; 12/20/93 Tr. 3. Rhymer lifted the box, retrieved a weapon from underneath the box, and handed the weapon to Hitesman, who saw that it was a nine-millimeter Glock semi-automatic pistol, loaded with a magazine clip containing six bullets,

one of which was in the firing chamber. *Id.* at 7-11, 13. The police also found a sawed-off shotgun in a boarded-up cabinet next to the stove in the kitchen (11/5/93 Tr. 16-18) and ammunition for the shotgun in a kitchen drawer (*id.* at 20-21; 11/8/93 Tr. 18; 12/20/93 Tr. 14).

While the police were present in petitioner's apartment, petitioner's mother went "back and forth" between the apartment and the main part of the house, to which the apartment was attached. 11/5/93 Tr. 74-75; 11/8/93 Tr. 11-12, 14-15. Petitioner's mother was "in and out" of the apartment while the police were searching but made no objection to the search. 11/8/93 Tr. 15.

At the police station, petitioner was advised of his *Miranda* rights and, after signing a written waiver, told the police that the gun had discharged accidentally. He stated that, after dressing on the morning of August 13, he retrieved his Smith & Wesson pistol, for which he had a license, from underneath the mattress. He then reached over the bed to give Hendricks a kiss and to tell her that he was leaving, when the gun accidentally went off. 1 Tr. 70-80. In a subsequent videotaped statement, petitioner told the police that Hendricks had been lying on her left side facing him when he leaned over to kiss her. 3A Tr. 80; 3B Tr. 85. Petitioner demonstrated Hendricks's position, and indicated that her right hand had been only a few inches from her head. 2 Tr. 219-221, 222-223. Petitioner repeated his earlier statement that he shot Hendricks with the Smith & Wesson, and he denied owning any other weapons. 3B Tr. 129-130.

2. Before trial, petitioner moved to suppress the weapons and ammunition seized during the search of his apartment. The district court suppressed the rifle, the sawed-off shotgun, and the shotgun ammunition, but denied the motion to suppress the Smith & Wesson, the Glock, and the shell casing found underneath the bed. Pet. App. 10a-11a, 12a-15a. The court first found that the police were lawfully on the scene of the homicide, having been called there by petitioner, and were therefore entitled to seize evidence in plain view, including the Smith & Wesson and the shell casing. *Id.* at 12a-13a. The court then ruled that the sawed-off shotgun was not in plain view, because it had been necessary for the police to pry off the cover of a recessed compartment to see it (*id.* at 13a), and that the rifle found on the closet shelf, although "borderline," was also not in plain view because it was necessary to pull it out further from the shelf to photograph it (*ibid.*). The court also held that the Glock was not in plain view, "since it was hidden under a box and under some clothing on top of a closet." *Ibid.* The court further found that neither petitioner nor his mother had expressly or impliedly consented to the search for the weapons, except for the Smith & Wesson. *Id.* at 13a-14a.

The district court ruled, however, that the Glock should not be suppressed, because it inevitably would have been discovered lawfully. The court reasoned that, once Officer Hitesman concluded that the Smith & Wesson tendered by petitioner as the weapon used in the shooting did not match the spent shell casing found underneath the bed, the police knew that some other weapon used in the homicide was still in petitioner's apartment. Pet. App. 14a-15a. Accordingly, the court concluded, the police "had an open and shut

motive" for obtaining a warrant, and "would have had open and shut grounds to be issued a search warrant." *Id.* at 15a. The court also noted that, because the police had secured the crime scene, "it would not have been possible for anybody to remove the weapon before they came back with a warrant." *Ibid.* Accordingly, the court held that the police would have inevitably found the Glock pistol during the course of a search with a warrant. *Ibid.*

3. a. At trial, the evidence established that Hendricks was killed with a bullet from a nine-millimeter Glock pistol, and that the bullet casing found underneath the bed had come from a nine-millimeter Glock pistol. 2 Tr. 118-125. Forensic pathologists testified that Hendricks sustained a gunshot wound on the left side of her nose, and that the gun was fired from a distance of approximately two feet from her face. 3A Tr. 27-28, 36-37, 45-46. The evidence also established that Hendricks was seated on the bed at the time she was shot, with her right arm extended forward in front of her face, and (based on the soot marks on Hendricks's palm) that her hand was close to the muzzle of the gun at the time it was fired—either hitting the barrel or grabbing and holding it. 2 Tr. 82-83; 3A Tr. 38, 44-45, 49-52, 82-84.

Petitioner testified in his own defense. He claimed that he had acquired the Glock pistol one week before the shooting and had hidden it under the mattress. 3B Tr. 120-126, 144. He testified that, on the morning of the shooting, he rose at approximately 7:30 a.m., showered, and dressed. Because Hendricks earlier had told him that she planned to clean up the apartment that day, and because he did not want her to find the Glock while she was cleaning, he removed it from underneath the mattress of the bed, intending

to secure it in the closet. *Id.* at 66-68, 145-146, 147-148. Before doing so, he leaned over Hendricks, who was asleep, to kiss her. *Id.* at 69-71. As he leaned over the bed, the gun accidentally discharged. *Id.* at 69-73, 151-156. He stated that, when he realized that Hendricks had been shot, he moved her to a sitting position on the bed and telephoned for an ambulance and the police. *Id.* at 73-74. He then picked up the Glock and placed it on the shelf where he had originally intended to put it. He claimed that he hid the Glock because he had no license for it. 4 Tr. 20, 24-25.

b. During cross-examination, the prosecutor asked petitioner whether he had weapons other than the Glock pistol in his apartment on August 13. 3B Tr. 126. The district court sustained an objection to that question. *Id.* at 127. At a sidebar conference, the prosecutor explained that he intended to impeach petitioner with evidence of the suppressed rifle and shotgun if petitioner denied possessing other guns. Defense counsel objected that he had not touched on the area during his direct examination of petitioner. The court again sustained the objection to the prosecutor's question, but did not prevent the prosecutor from cross-examining petitioner concerning his post-arrest statement to the police. *Id.* at 127-129.

Petitioner admitted, under cross-examination, that, in his videotaped statement to the police, he falsely stated that he had shot Hendricks with his Smith & Wesson and that he owned no other weapons. 3B Tr. 129. The following exchange occurred:

> Q. That wasn't true because you had the Glock; correct?
>
> A. It wasn't true because I know when the police had came to the scene that what I would

have been getting in trouble for was the Glock, so, yes it wasn't the Glock I said.

Q. That's not my question. My question is when you were asked by the police officer, Ramirez, do you own any other weapons, your answer was no; correct?

A. That was in the video statement.

Q. Yes, sir, and your answer was no?

A. Yes.

Q. And it was not true because you did own other weapons?

A. Yes.

Q. Weapons other than this Glock at issue right now?

A. Yes.

Q. What other weapons did you own?

A. I had an antique rifle and an old shotgun.

* * * * *

Q. So when you told Officer Ramirez no, you had no other weapons beside your Smith & Wesson, in fact you had three other weapons; correct?

A. Yes, I did.

Id. at 129-130, 132. Defense counsel did not object to that questioning.

c. The district court charged the jury that, to establish second-degree murder, the government was required to prove that petitioner unlawfully caused Hendricks's death, and that he acted willfully and with malice aforethought. 6 Tr. 95-98. The court instructed the jury that "malice aforethought" meant "either an intent, at the time of the killing, willfully to take the life of a human being, or an intent will-

fully to act in callous and wanton disregard of the consequences to human life." *Id.* at 96. The court further instructed the jury as follows:

> Homicide, that is to say, the killing of another person, is excusable under the law of the Virgin Islands when committed by accident and misfortune, or in doing any lawful act by lawful means, with usual and ordinary caution, and without any unlawful intent.

Id. at 98. Petitioner did not object to that charge.[2]

4. On appeal, petitioner argued, *inter alia*, that the Glock should have been suppressed as the fruit of an illegal search, and that the district court had erroneously applied the inevitable discovery exception to the exclusionary rule; that the district court had improperly allowed the government to cross-examine him concerning his possession of the sawed-off shotgun and the rifle; and that the district court had improperly failed to instruct the jury as to the bur-

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[2] Petitioner had requested that the district court give the following charge to the jury (C.A. App. 642-A):

> Homicide is excusable—
>
> (1) when committed by accident and misfortune, or in doing any lawful act by lawful means, with usual and ordinary caution, and without any unlawful intent; or
>
> (2) when committed by accident and misfortune, in the heat of passion, upon any sudden and sufficient provocation, or upon a sudden combat, when no undue advantage is taken, nor any dangerous weapon used, and when the killing is not done in a cruel or unusual manner.

That instruction was not included in the jury instructions as proposed by the court. Petitioner's counsel was invited to comment on the proposed instructions, and, during the charge conference, expressed satisfaction with them. C.A. Supp. App. 531.

den of proof on excusable homicide. The court of appeals summarily affirmed petitioner's convictions. Pet. App. 3a-5a.

ARGUMENT

1. Petitioner contends (Pet. 9-13) that the district court should have suppressed the Glock as the fruit of a warrantless search, and that it erred in relying on the "inevitable discovery" exception to the exclusionary rule in ruling that the gun was admissible. Further review of those contentions is not warranted.

a. The inevitable discovery doctrine permits illegally seized evidence to be admitted at trial if the government establishes "that the information ultimately or inevitably would have been discovered by lawful means." *Nix* v. *Williams*, 467 U.S. 431, 444 (1984); see *Murray* v. *United States*, 487 U.S. 533, 539 (1988). In this case, the trial court noted that the police had secured petitioner's apartment after the murder; that they possesed information indicating that the weapon used in the murder was still in that apartment; that they had clear reason to seek a search warrant, to find the murder weapon; and that they had sure grounds for obtaining a warrant upon application. Based on those facts, the district court held that the discovery of the Glock during a warrant-authorized search would have inevitably occurred in the course of the investigation. Pet. App. 15a.

Petitioner challenges that conclusion, arguing (Pet. 11) that, "[i]f the trial court's logic is accepted by this Court, [a] law enforcement office[r] will never have reason to obtain a warrant" whenever he "has satisfied himself that he has probable cause to

search." But in affirming the judgment, the court of appeals did not expressly rely on the inevitable discovery rationale and did not explicate the factors that entered into its rejection of petitioner's claims that "the [trial] court (a) erroneously applied the inevitable discovery exception to the exclusionary rule; and, (b) impermissibly received into evidence * * * a .9mm semi-automatic Glock pistol recovered during an illegal search of [petitioner's] apartment." Pet. App. 4a. Rather, the Third Circuit summarily affirmed petitioner's convictions, and its ruling therefore does not establish precedent in that circuit on the inevitable discovery issue.

There is some disagreement among other courts of appeals about the circumstances in which the inevitable discovery doctrine may be invoked to admit evidence seized during an unlawful, warrantless search when it is certain that a warrant would have been issued had it been sought. Compare, *e.g.*, *United States* v. *Buchanan*, 910 F.2d 1571, 1574 (7th Cir. 1990) (affirming admission of evidence under inevitable discovery doctrine when warrant could have been obtained) with *United States* v. *Johnson*, 22 F.3d 674, 683 (6th Cir. 1994) (rejecting application of inevitable discovery doctrine). See also *United States* v. *Cherry*, 759 F.2d 1196, 1205-1206 (5th Cir. 1985) ("prosecution must demonstrate both a reasonable probability that the evidence would have been discovered in the absence of police misconduct and that the government was actively pursuing a substantial alternate line of investigation at the time of the constitutional violation"); *United States* v. *Silvestri*, 787 F.2d 736, 742-746 (1st Cir. 1986) (rejecting firm requirements for application of the inevitable discovery doctrine, but suggesting in dicta

that if no warrant was obtained, active pursuit of one might be required), cert. denied, 487 U.S. 1233 (1988); *United States* v. *Boatwright*, 822 F.2d 862, 864-865 (9th Cir. 1987) (suggesting case-by-case approach to the issue, with background presumption that "the doctrine requires that the fact or likelihood that makes the discovery inevitable arise from circumstances other than those disclosed by the illegal search itself").

The Third Circuit has not spoken to this issue. In *United States* v. *Herrold*, 962 F.2d 1131, cert. denied, 113 S. Ct. 421 (1992), the Third Circuit concluded that "an inevitable discovery analysis is inappropriate" when the police have seized evidence, pursuant to a warrant, after having previously observed that evidence during an illegal warrantless search. 962 F.2d at 1139; see also *id.* at 1143 n.12. Rather, the court ruled the evidence admissible under the separate, but related, "independent source" doctrine. *Ibid.* It therefore remains unclear how the Third Circuit would apply the inevitable discovery doctrine in a case in which a warrant was not issued after the initial unlawful search. And because the court did not provide an analysis of that doctrine here (or expressly rely upon it), this Court's review of the issue in this case is not warranted.

b. Review is not warranted in any event because the warrantless seizure of the Glock did not violate the Fourth Amendment irrespective of the inevitable discovery doctrine, and therefore the district court did not err in admitting the Glock into evidence. Although the district court rejected the government's argument on this point, the record indicates that the Glock was in plain view. The officers had been called to the scene to investigate a shooting

and were lawfully on the premises when Officer Rhymer observed, in plain view, a rifle resting on the closet shelf.[3] Rhymer was therefore justified in standing on a chair to examine and seize the rifle. See *Horton* v. *California*, 496 U.S. 128, 136-137 (1990); *Illinois* v. *Andreas*, 463 U.S. 765, 771 (1983). Once he stood on the chair, he was also able to see something at the other end of the closet, underneath a box, that "made [him] lift th[e] box" (11/5/93 Tr. 72); he observed that "someone had lifted the box and put [the Glock] under the box" (*id.* at 70). Thus, although the Glock was underneath a box, Officer Rhymer was able to see it from his position in the closet, and he properly seized the Glock under the "plain view" exception to the warrant requirement. *Arizona* v. *Hicks*, 480 U.S. 321, 326-329 (1987).

Moreover, even accepting the district court's holding that the Glock was not in plain view, the Fourth Amendment was not violated because the police were justified in conducting a limited search of the bedroom for a loaded firearm that could have presented a serious danger to their safety. Cf. *Maryland* v. *Buie*, 494 U.S. 325, 327 (1990); *United States* v. *Lopez*, 989 F.2d 24, 27 (1st Cir.), cert. denied, 114 S. Ct. 201 (1993). After Investigator Hitesman examined the spent shell casing and concluded that it could not have come from the Smith & Wesson

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[3] The district court's ruling that the rifle was not in plain view because it had to be pulled further out from the shelf to be photographed is plainly erroneous. Officer Rhymer's testimony established that he saw the butt of a rifle from his position below the shelf of the open closet in petitioner's bedroom. 11/5/93 Tr. 69, 70. The rifle was therefore in plain view, and Officer Rhymer was entitled to stand on a chair to seize it and examine it further.

pistol identified by petitioner as the homicide weapon, the officers became aware of the high probability that another weapon was in the apartment. In addition, because the officers found only one shell casing, it was likely that the missing weapon was still loaded, which turned out to be the case. See pp. 3-4, *supra*. The presence of the loaded weapon presented a serious danger to the police, and that danger was exacerbated by the fact that petitioner's mother still had access to the apartment and was freely moving back and forth between her house and the apartment. Under those circumstances, the police were not required to obtain a warrant before they looked for a loaded weapon in the room in which the killing had taken place. Cf. *Buie*, 494 U.S. at 334; *Lopez*, 989 F.2d at 27 (upholding warrantless search for weapon when "the intrusion, although not minimal, was limited"; "[t]here was no new entry into a private residence" because the police were "lawfully" there; and the object of the search was "a dangerous weapon in a building where others might gain access to it"). But cf. *United States* v. *Ford*, No. 94-3057 (D.C. Cir. June 9, 1995), slip op. 13 (holding *Buie* inapplicable to search for weapons under mattress and behind window shade).[4]

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[4] Even if the admission of the Glock was error, that error was clearly harmless on the murder count and the obstruction of justice count. On the murder charge, the evidence of Hendricks's seated position, the fact that she was shot from a distance of two feet, and the soot marks on her hands indicating that she was grabbing or hitting the barrel of the gun demonstrated beyond a reasonable doubt that she was not killed accidentally. The specific weapon used in the killing was not crucial to the murder case, and the evidence was sufficiently compelling that the jury would have found petitioner

2. Petitioner also argues (Pet. 13-14) that his conviction must be reversed because the prosecutor, on cross-examination, improperly questioned him about the rifle and shotgun suppressed by the district court. That factbound contention is without merit.

Absent an exception, the exclusionary rule prohibits the introduction into evidence of items seized during an unlawful search and of "testimony concerning knowledge acquired during an unlawful search." *Murray* v. *United States*, 487 U.S. 533, 536 (1988). In this case, the government introduced neither the suppressed weapons themselves nor testimony concerning their existence or presence at the murder scene. Rather, the prosecutor cross-examined petitioner about his post-arrest statement to the police, in which he asserted that he had shot Hendricks with a Smith & Wesson and denied owning any other weapons. Based on that incident, petitioner was charged with obstructing justice by falsely

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guilty beyond a reasonable doubt even if the police had never recovered the murder weapon. The admission of the Glock was harmless on the obstruction of justice count because, even before the police recovered the Glock, they concluded that the bullet used in the murder and found underneath the bed could not have come from the Smith & Wesson tendered by petitioner as the homicide weapon. Petitioner's statements to the police, both at the house and at the police station, that he used the Smith & Wesson in the killing, obstructed the investigation without regard to the fact that the police eventually recovered the Glock. In addition, although the government's expert witness at trial was able to state with certainty that the expended shell came from a Glock, he could not state conclusively that it came from the Glock found in petitioner's closet. See 2 Tr. 122-123. Petitioner's conviction on obstruction of justice therefore did not rest on the fact that the police recovered the Glock used in the murder.

stating to the police that he shot Hendricks with a Smith & Wesson. See C.A. App. 5.

The prosecutor properly asked petitioner what he had told the police following his arrest, and whether he had told the truth. Petitioner acknowledged that he told the police that he owned no weapons other than the Smith & Wesson, and that his statement to that effect was false. The prosecutor, in turn, asked whether the statement was false because he owned weapons other than the Glock, without referring specifically to any other weapons. Petitioner's counsel did not object to that question, and petitioner admitted that he did own other weapons. The prosecutor followed up by asking what other weapons petitioner owned, and petitioner testified in response that he owned a rifle and shotgun. See 3B Tr. 130.

The questioning of petitioner was permissible. The exclusionary rule did not preclude the prosecutor from asking petitioner whether his post-arrest statements to the police were false, or from inquiring why they were false. The prosecutor carefully avoided mentioning any specific weapons other than the Glock or directly confronting petitioner with evidence that he owned the suppressed weapons.

At the point at which the prosecutor asked petitioner whether his statement was false because he owned weapons other than the Glock, defense counsel raised no objection. Even assuming there was any impropriety in that question, it did not amount to plain error. The shotgun and rifle were not central to any of the counts on which petitioner was found guilty. Neither was used in the killing of Hendricks, and petitioner's conviction on obstruction of justice rested on his false statements that he used the Smith

& Wesson in that shooting, not his possession of the shotgun or the rifle. Petitioner's admission that he also owned a shotgun and a rifle therefore had no appreciable impact on the jury's verdict.

3. Relying on *Government of the Virgin Islands* v. *Smith*, 949 F.2d 677 (3d Cir. 1991), petitioner argues (Pet. 14-16) that the district court committed plain error in failing to instruct the jury that the prosecution has the burden of proof on the "affirmative defense" of excusable homicide. That contention is incorrect.

In *Smith*, the Third Circuit held that, in a murder prosecution under Virgin Islands law, once the defendant has placed the affirmative defense of self-defense in issue, the government is required to disprove self-defense beyond a reasonable doubt, and the trial court must so instruct the jury. 949 F.2d at 680-681. Petitioner's defense in this case was based on his assertion that his killing of Hendricks was accidental. It is not clear, however, that, under Virgin Islands law, petitioner's defense based on accident would be considered a separate affirmative defense, rather than a contention that he lacked the necessary *mens rea* to commit the crime charged. The court of appeals did not address that issue, and we are not aware of any case law directly addressing the point under Virgin Islands law. While we do not dispute that the government ultimately had the burden of proving beyond a reasonable doubt that the shooting was not accidental, the failure to give a separate instruction on that point was not plain error, since the district court instructed the jury that the prosecution had the burden of proof on every element of the offense. See 6 Tr. 74, 76-77.

The trial court further instructed the jury that, to convict petitioner of second degree murder under Virgin Islands law, the government was required to prove beyond a reasonable doubt that petitioner acted willfully and with malice aforethought. The court explained to the jury that "malice aforethought" required an intent to take the life of a human being or to act in callous and wanton disregard of the consequences to human life. 6 Tr. 96. The district court thus adequately instructed the jury that petitioner could be convicted of murder only if the prosecution proved beyond a reasonable doubt that he acted with unlawful intent. Since it was clear that a finding of malice aforethought would have been incompatible with petitioner's claim of accident, the court's instructions effectively conveyed to the jury that the prosecution was required to prove that the shooting of Hendricks was not accidental.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

JO ANN HARRIS
Assistant Attorney General

DEBORAH WATSON
Attorney

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